IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN RUSH	:	CIVIL ACTION
	:	
v.	:	NO. 03-4810
	:	
EDWARD KLEM, et al.	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **July 22, 2005**

John Rush asks this Court to grant him habeas corpus relief under 28 U.S.C. § 2254,[1] releasing him from his life sentence for murder. Rush argues the Parole Board used post 1996 parole laws to deny his application for parole in violation of the ex-post facto clause of the Constitution. After a careful and independent review under 28 U.S.C. § 636, this Court finds Rush's claims are both procedurally defaulted and without merit. United States Magistrate Judge

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[1] **§ 2254. State custody; remedies in Federal courts**

> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
> **(b)(1)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that - -
>
> > **(A)** the applicant has exhausted the remedies available in the courts of the State; or
> > **(B)(i)** there is an absence of available State corrective process; or
> > **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

Timothy R. Rice's Report and Recommendation is approved and Rush's objections are overruled.

FACTS

Rush was sentenced to life imprisonment after his 1971 murder conviction. In 1980, Rush was released from prison after his sentence was commuted by the Governor. Rush returned to custody in 1983 after he was convicted of federal drug trafficking charges. Rush has subsequently been paroled and recommitted to prison five times. He was last recommitted on August 6, 1997. After being recommitted in August 1997, Rush has applied for parole annually but the parole board has denied his requests.

On September 16, 2004 Rush filed a petition for a writ of mandamus in the Commonwealth Court challenging the April 27, 2004 denial of his parole application. The Commonwealth Court dismissed his petition in November 2004. Rush did not appeal. Rush filed a federal habeas petition on January 24, 2005. He claims the parole board applied post 1996 parole laws to his case in violation of the ex post facto clause.[2] Magistrate Judge Rice recommends Rush's petition be dismissed as procedurally defaulted and, in the alternative, denied as meritless. Rush objects to the Report and Recommendation (R&R) claiming its conclusions were inconsistent with the rules of law espoused by the United States Supreme Court and the Third Circuit Court of Appeals.

DISCUSSION

Rush failed to exhaust his state court remedies, therefore, his habeas petition is procedurally defaulted. This Court may not consider the merits of a petition for a writ of habeas corpus unless available state court remedies have been exhausted. 28 U.S.C. § 2254(b)(1)(A). The exhaustion

[2] The ex post facto clause prohibits inflicting a "greater punishment than the law annexed to the crime when committed." U.S. Const. Art. I, Sec. 10 cl.1.

requirement is satisfied if the federal claim was fairly presented to the state appellate courts. *Baldwin v. Reese*, 124 S.Ct. 1347, 1349 (2004). The exhaustion requirement includes all appeals. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845-47 (1999); *Wenger v. Frank*, 266 F.3d 218, 223 (3d Cir. 2001). A petition that contains even one unexhausted claim must be dismissed as a mixed petition. *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

Rush argues his failure to exhaust his state court remedies should be excused as an exercise in futility. "[E]xhaustion is excused if a return to state court would be futile because of an absence of available [s]tate corrective process, or circumstances exist that render such process ineffective to protect the rights of the applicant." *Lines v. Larkins* 208 F.3d 153, 162 (3d Cir. 2000)(citations omitted). Futility is established "where exhaustion is not possible because the state court would refuse on procedural grounds to hear the merits of the claims." *Lines*, 208 F.3d at 163. Rush claims the exhaustion of his state remedies would have been an exercise in futility because the Pennsylvania Supreme Court rejected all ex post facto challenges to the 1996 amendment to the Parole Act.

Rush's failure to exhaust cannot be excused as an exercise in futility. "The fact that it is merely unlikely that further state process is available is [] insufficient to establish futility." *Lines*, 208 F.3d at 163. "Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 124 S. Ct. 1347, 1349 (2004)(*citations omitted*). The prisoner must present his claim in each appropriate state court, including a state supreme court with powers of discretionary review. *Id*. "Indeed it is the very prospect that a state court may decide, upon reflection, that the contention is valid that undergirds the established rule

that perceived futility alone cannot constitute cause for allowing criminal defendants to deprive the state courts of the opportunity to reconsider previously rejected constitutional claims . . . ." *Smith v. Murray*, 477 U.S. 527, 535 (1986)(internal citations and quotations omitted). *See Engle v. Isaac*, 456 U.S. 107, 130 (1982)*; Holland v. Horn*, 150 F. Supp. 2d 706, 773 (E.D. Pa. 2001). Rush did not present his Parole Act claims to the Superior Court in a direct appeal. His failure to do so denied the state court the opportunity to review and correct alleged violations of his rights. Rush's failure to present his claims to the state courts means he has not met the exhaustion requirements of 28 U.S.C. § 2254(b)(1)(A). This petition could, therefore, be dismissed on procedural grounds.

This Court may deny a habeas petition on the merits even where the petitioner has failed to satisfy exhaustion. *See* U.S.C. § 2254(b)(2). Rush claims the Board violated the ex post facto clause when it denied his parole under the 1996 Parole Act. Prior to 1996, the public policy of the Parole Act was to subject prisoners to a "period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration . . . ." 61 P.S. § 331.1 (pre 1996). In 1996 the Parole Act was amended. The new language of the Act identified public safety as the primary concern in the decision to grant or deny parole. 61 P.S. § 331.1.[3]

"A new law or policy violates the ex post facto clause (1) when it is retrospective, i.e.,

[3] The Act as amended in 1996 states:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison. In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

when it applies to events occurring before its enactment, and (2) when it disadvantages the offender affected by it." *Mickens-Thomas v. Vaughn* 321 F.3d 374, 384 (3d Cir. 2003)(internal quotation marks and brackets omitted). To state an actionable claim Rush must show the change in the Parole Act carries "a significant risk of prolonging [his] term of incarceration, or that it negatively impacts the chance [he] has to be released on parole." *Cimaszewski v. Board of Probation and Parole*, 868 A.2d 416, 427 (Pa. 2005). In other words, he must show under the pre-1996 Parole Act, the Board would likely have paroled him. *Id*.

As Magistrate Judge Rice states, "a careful examination of the Board's April 27, 2004 denial of parole establishes that the Board would not have paroled Rush under any version of the Act." *R&R* at 13. The Board denied Rush's application for parole based on the nature and circumstances of Rush's offense, Rush's refusal to accept responsibility, his history of parole violations and its assessment of his physical, mental and behavior condition and history. The Board concluded Rush's best interests and the Commonwealth's best interests would not be served if Rush was re-paroled. *Id.* The Board's decision adheres to the public policy of the pre-1996 version of the Act. The decision shows the Board applied the factors referenced in the pre-1996 Parole Act and did not give public safety controlling weight. Rush, therefore, cannot prove he would have been released on parole had the 1996 Parole Act amendment never been adopted.

Rush also claims the Board retroactively applied a 1998 law, which requires the Board to consider a violent offender's participation in a victim impact education program.[4] There is no indication that the Board's decision considered Rush's participation or lack of participation in this

[4] Under 61 P.S. § 331.21 "[t]he board may not release a person who is serving a sentence for a crime of violence as defined in 42 Pa.C.S. § 9714(g) (relating to sentences for second and subsequent offenses) on parole unless the person has received instruction from the Department of Corrections on the impact of crime on victims and the community."

program. This claim must also be denied because Rush has offered no credible evidence to the contrary.

Finally, Rush argues the pre-1996 version of the Act permitted him to submit a parole application every six months.[5] He claims the post 1997 version of the Act requires him to wait one year before submitting a parole application. Rush misinterprets Section 22 of the Act to mean he may not re-apply for parole for one year. Rush may file a parole application at any time under section 22 of the Act. If the Board has issued a parole decision in Rush's case within the past year, the Board has discretion in deciding whether to consider Rush's application. *Rauso v. Pennsylvania Bd. of Probation & Parole*, 762 A.2d 774, 776 (Pa. Commw. Ct. 2000).

Even if this Court adopts Rush's interpretation of the Act, there is still no ex post facto violation. "To fall within the ex post facto prohibition, two critical elements must be present: first, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430 (1987)(internal quotations and citations omitted). Rush, therefore, bears the burden of proving the application of the post-1996 Act will result in a longer period of incarceration than under the earlier rule. *Garner v. Jones*, 529 U.S. 244, 255 (2000).

Rush received a life sentence for murder. The one-year rule set forth in the post-1996 version of the Parole Act has not imposed any additional punishment on Rush. Rush may apply for parole at any time and the Board, in its discretion, may consider Rush's application before the one year has expired. *See Rauso v. Pennsylvania Bd. of Probation & Parole*, 762 A.2d 774, 775-76 (Pa. Commw. Ct. 2000). Accordingly, Rush's habeas corpus petition is denied.

[5] The pre-1996 version of the Act states "[a]pplication shall be disposed of by the board within six months of the filing thereof." 61 P.S. § 331.22 (1996).

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ORDER

And now, this 22nd day of July, 2005 it is hereby ORDERED, the Report and Recommendation of the Magistrate Judge Rice is APPROVED and ADOPTED, the petition for a writ of habeas corpus is DENIED and no certificate of appealability will be granted.

BY THE COURT:

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Juan R. Sánchez, J.